93-33

No. _____

In The

Supreme Court of the United States

October Term, 1993

ANGEL ALVAREZ-AGUIRRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

II. WHETHER THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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In The

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ANGEL ALVAREZ-AGUIRRE,

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UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner ANGEL ALVAREZ-AGUIRRE respectfully prays that a Writ of Certiorari issue to review the unpublished opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on April 2, 1993, styled *United States of America v. Angel Alvarez-Aguirre,* 5th Cir.

OPINION BELOW

The unpublished opinion of the court of appeals, styled *United States of America v. Angel Alvarez-Aguirre* and numbered Cause No. 92-85408, was entered on April

2, 1993. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition is filed within ninety (90) days from April 2, 1993, the date on which the opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered. SUP.CT.R. 13.1. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

STATEMENT

The basis for federal jurisdiction in the court of first instance was Title 18 U.S.C. § 3231.

On November 7, 1991, Carlos Antonio Lopez (Lopez) and Frank R. Banuelos (Banuelos), agents with the United States Border Patrol, assigned to the Narcotics Task Force in El Paso, Texas, were working plain clothes at the

airport attempting to interdict narcotics going through there. At approximately 6:00 a.m., the agents were stationed at the front portion of the airport where the ticket counters are located when they observed two subjects, a male and a female, approach the Delta ticket counter. The male subject was carrying two canvas bags that were grey in color with flower designs on them which he checked in at the Delta counter. The agents were aware of a Delta flight that departed to Dallas, Texas, at 6:30 a.m. As the agents got closer to the subjects, Banuelos mentioned that the male subject resembled "a lookout[1] posted in the Border Patrol office." As the subjects left the line after purchasing their tickets, the agents noticed that the male "tried to shield his face from us." As the two subjects walked toward the concourse, the male went to a drinking fountain and the female entered into the lady's room. Because of the "nervousness" of the male subject, the agents decided to get an ID on the two individuals. Lopez and Banuelos approached the male subject at the drinking fountain, identified themselves as border patrol agents, and asked him his citizenship and nationality. The male, identified as appellant herein, stated that he was born in Mexico but was a permanent resident alien in the United States. However, appellant stated that he had left his resident alien card at his home. Appellant also stated that he had brought his wife to the airport as she was leaving on a trip. At that point appellant was detained until the agents could verify his status with the central office.

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[1] The "lookout" was a xerox, blowup picture of a male and female who were suspected money carriers and cocaine carriers in the El Paso area.

Shortly thereafter, the female subject exited the restroom at which time the agents approached her, identified themselves, and questioned her about her citizenship. The female, identified as Ana Marie Alvarez (Alvarez), stated that she was a United States citizen, and produced both a Texas ID card and a birth certificate. Alvarez also produced one airline ticket in her name. Lopez noticed that there were other birth certificates in her bag so he asked Alvarez if he could see them. Alvarez handed the birth certificates[2] to Lopez and explained that they belonged to her children. Lopez then requested permission to search the bags that had been checked.[3] Alvarez became "nervous," her "complexion changed," and she refused *twice* to allow a search of her bags. Alvarez told the agents that she was a United States citizen, that she was going to miss her flight, and "could we please let her leave." However, the agents continued to detain her because of the possibility that she was smuggling illegal aliens. Because Alvarez refused consent to search her bags, Lopez "became suspicious that there was something other than maybe immigration documents in her bags" because, as he testified, "most aliens that I've worked with will allow you to go through their bags, especially if they have immigration documents" and "most smugglers that I've worked with say, 'Go ahead. Look into my bags. I have nothing to hide.' " Lopez also admitted on cross-examination that when Alvarez refused consent, he

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[2] There were a total of four other certificates in Alvarez's purse with three different names and one name duplicated.

[3] Lopez believe that Alvarez might have more immigration document in her bags.

became more suspicious than he was before. At that time, while Banuelos continued to detain appellant and Alvarez, Lopez proceeded to the Delta baggage area, identified the bags that had been checked, and compressing the sides of one of them, felt two or three bundles and smelled the strong odor of marijuana. Lopez then returned to where Banuelos was detaining appellant and Alvarez and placed both of them under arrest for possession of marijuana and read them their *Miranda*[4] rights. As the agents were transporting the two subjects to the Border Patrol Office, Alvarez kept commenting that "whatever was in the bags was her fault" not her husband's. At the office, Alvarez consented to a search of the bags and approximately sixty (60) pounds of marijuana were discovered in both of them.

Armando Fonseca (Fonseca), an officer with the El Paso Police Department assigned to the Narcotics Task Force, was called to the airport to conduct interviews on both appellant and Alvarez. Both confessed to their knowledge of the marijuana in the bags.

On December 4, 1991, appellant and Alvarez were named in both counts of a two-count indictment issued out of the El Paso Division of the Western District of Texas, and were charged with conspiring to possess, and possession with intent to distribute, a quantity of marijuana, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

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[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

On January 30, 1992, appellant filed a motion to suppress evidence alleging that the discovery of contraband was the result of an illegal detention on the part of border patrol agents. On May 26, 1992, following a hearing that was conducted on May 22, 1992, the district court denied said motion.

On July 31, 1992, pursuant to a plea agreement with the government, appellant entered a conditional plea of guilty to Count One of the indictment reserving his right to appeal the district court's denial of his motion to suppress the evidence. In return for said plea, the government moved to dismiss Count Two.

On September 30, 1992, the district court sentenced appellant to a term of twenty-one (21) months imprisonment, three (3) years of supervised release, and a special assessment of $50.00.

On appeal, appellant argued that the border patrol agents were not aware of specific and articulable facts which would have justified a temporary detention, and that since the detention was illegal, all evidence including his confession should have been suppressed.

The Fifth Circuit disagreed. The Court characterized the initial encounter between appellant and the agents as a consensual one, rather than an illegal detention. Since appellant failed to produce his "green card", a violation of Title 8 U.S.C. § 1304(e), he was lawfully detained pending computer verification of his immigration status. Concluding, the Court stated:

> "While he was lawfully detained, the marijuana was discovered, establishing probable cause for his arrest."

The Court did not mention this Court's recent opinion in *Soldal v. Cook County, Ill.*, ___ U.S. ___, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), in which this Court discusses when a seizure of property occurs for Fourth Amendment purposes.[5]

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS RENDERED A DECISION THAT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In *United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988), the Fifth Circuit held that no "seizure" occurred when border patrol agents removed luggage that had been checked at an airport and placed on a conveyor belt. The Court stressed that the rationale for that determination was that the defendant had voluntarily "surrendered his bags to a third-party common carrier [by checking in his bags], with the expectation that the carrier would transport the bags to [defendant's] destination for him to reclaim when he arrived." *Id.* at 916. In so holding, the Court referred to this Court's decision in *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983),

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[5] Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, appellant advised the Court in January, 1993, of this Court's decision in *Soldal*.

which concluded that a dog sniff was not a search, but "went on to reason that there was undoubtedly a seizure of the defendant's luggage when it was taken from his custody in order to arrange exposure to a narcotics detention dog." *Lovell, supra,* at 915-16 (citing *Place,* 462 at 707-09, 103 S.Ct. at 2644-46) (emphasis in original). *See also Arizona v. Hicks,* 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987) ("[T]he 'distinction between "looking" at a suspicious object in plain view and "moving" it even a few inches' is much more than trivial for purposes of the Fourth Amendment").

In the present case, the Court upheld the legality of appellant's detention, and then simply stated that "[w]hile he was lawfully detained, the marijuana was discovered, establishing probable cause for his arrest." *See supra.* The Court failed to address the legality of the *seizure* of appellant's luggage from the Delta baggage area where it had been checked in light of this Court's recent opinion in *Soldal v. Cook County, Ill., supra,* which was decided on December 8, 1992. In *Soldal,* this Court again stressed that "[a] 'seizure' of property . . . occurs when 'there is some meaningful interference with an individual's possessory interests in that property." *Id.,* at ___, 113 S.Ct., at 543. The Court further held that seizures of property can be justified only if they meet the probable cause standard. *Id.,* at ___, 113 S.Ct., at 546. Appellant submits that the justification expressed in *Lovell* for allowing the "seizure" of luggage that has been checked at an airport must be reexamined in light of this Court's opinion in *Soldal.*

Furthermore, this case presents the Court with the important question whether, absent probable cause, federal agents can lawfully seize luggage that has been checked at an airport. Although the Fifth Circuit has previously upheld this procedure, appellant submits that this Court's recent opinions demand a different result.

CONCLUSION

For the foregoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8540
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANGEL ALVAREZ-AGUIRRE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP-91-CR-378)

(Filed April 02, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Challenging the denial of his motion to suppress evidence, Angel Alvarez-Aguirre (Aguirre) appeals his conviction, following a conditional plea of guilty, of conspiracy to possess with intent to distribute marihuana in

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

violation of 21 U.S.C. § 841(a)(1) and 846. Finding no error, we affirm.

I.

The district court found that Border Patrol agents Carlos Lopez and Frank Banuelos observed Aguirre and his wife, Ana Marie Alvarez (a defendant in a related case, No. 92-8541, which arises out of the same sequence of events), enter the terminal area of the El Paso International Airport and stand in line at the Delta Airline ticket counter. He appeared to be nervous and looked over his shoulder directly at the agents. He checked two pieces of luggage, bought his ticket, and walked away. As he passed the agents, he held his ticket in front of his face in a way that indicated that he was shielding his face from view. The agents noticed that he resembled a "look-out" picture posted in their office and decided to follow him for questioning.

The agents approached him and inquired as to his citizenship. Aguirre replied that he was a Mexican citizen but was legally admitted for permanent residence in the United States. When asked to produce his "green" card, Aguirre responded that he had left it at home. The agents then informed him that they needed to verify his immigration status by computer.

At that time, Alvarez emerged from the ladies restroom. The agents inquired as to her citizenship and were informed that she was a United States citizen. She produced a Texas birth certificate, at which time the agents noticed that she had other birth certificates in her purse. The agents then asked whether she had checked any

luggage, to which she applied affirmatively. They then requested consent to search the luggage. Consent was denied.

One of the agents then went to the baggage area, located the suitcases, squeezed their sides, and detected the odor of marihuana. Both parties were immediately arrested. Aguirre subsequently confessed that he brought Alvarez to the airport knowing that the suitcases contained marihuana.

II.

Aguirre contends that his confession was obtained as a result of an illegal detention by the Border Patrol agents, and thus, the district court erred in failing to grant his motion to suppress. His argument is unavailing.

In reviewing a district court's ruling on a motion to suppress based upon live testimony at a suppression hearing, we must accept the district court's purely factual findings unless they are clearly erroneous. *United States v. Muniz-Melchor*, 894 F.2d 1430, 1433-34 (5th Cir.), *cert. denied*, 495 U.S. 923 (1990). The evidence presented at a suppression hearing is viewed in the light most favorable to the prevailing party. *United States v. Lopez*, 911 F.2d 1006, 1008 (5th Cir. 1990).

The district court's fact findings are reasonably supported by the record and are not clearly erroneous, and Aguirre does not contest them on appeal. He only argues that the fact that Banuelos thought that he resembled a "look-out" poster, and that the agents thought he tried to shield his face, are insufficient to create specific and

articulable facts that would support his initial detention. He is mistaken.

In the context of airport stops, we apply a three-tiered analysis. *United States v. Berry*, 670 F.2d 583, 591 (5th Cir. Unit B 1982) (en banc). The initial tier, which does not implicate the Fourth Amendment, is mere communication between law officers and citizens devoid of coercion or detention. The uncontested facts in this case are that the agents approached Aguirre, inquired as to his citizenship, and then requested to see his "green" card. He failed to produce the card as required by immigration law. *See* 8 U.S.C. § 1304(e).

Section 1304(e) requires all aliens over eighteen years of age to carry registration papers on their persons at all times, and it is a criminal offense to be in violation of the statute. *See United States v. Ritter*, 752 F.2d 435, 437 (5th Cir. 1985). Because he was in violation of 8 U.S.C. § 1304(e), Aguirre was lawfully detained pending computer verification of his immigration status. *See United States v. Basey*, 816 F.2d 980, 990 (5th Cir. 1987). While he was lawfully detained, the marihuana was discovered, establishing probable cause for his arrest.

AFFIRMED.

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit
By /s/ June Payne
Deputy
New Orleans, Louisiana
APR 25 1993